

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer
Governor

J. Randall Evans
Secretary

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

— DECISION —

IN THE MATTER OF THE APPEAL OF
Modern Systems International

Decision No.: 44 -EA-91
Date: Nov. 21, 1991
Exec. Determ. No.: 7641
Employer Account No.: -

ISSUE:

Whether commissions paid to non-licensed salesmen from a collection agency are covered wages for unemployment insurance purposes.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY, IN THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU DO BUSINESS.

THE PERIOD FOR FILING AN APPEAL TO COURT EXPIRES December 21, 1991.

— APPEARANCES —

For the Appellant:

For the Secretary:

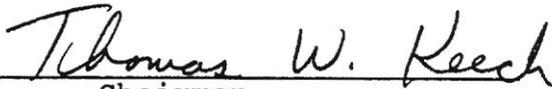
REVIEW ON THE RECORD

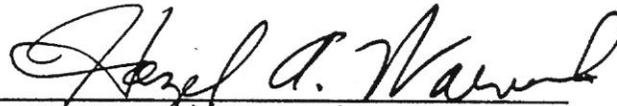
Upon review of the record of this case, the Board of Appeals adopts the findings of fact and conclusions of law of the Special Examiner.

DECISION

Modern Systems International has not satisfied the statutory requirements of Section 8-205(1) and (3) of the Labor and Employment Article (formerly Section 20(g)(6)(i) and (iii) of the Maryland Unemployment Insurance Law) regarding services performed by specific sales representatives as contained within the agency's audit report. These individuals' earnings were in covered employment at this employer, Modern Systems International, and the employer would have been required to report such wages for Maryland Unemployment Insurance purposes.

The decision of the Special Examiner is affirmed.


Chairman


Associate Member

K:HW

kbm

COPIES MAILED TO:

EMPLOYER

Jerry Placek, Room 407

John T. McGucken, Legal Counsel, D.E.E.D.

Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033

BOARD OF APPEALS
Thomas W. Keech, Chairman
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- DECISION -

IN THE MATTER OF THE APPEAL OF:
Modern Svstems International

17 -EA-91

Date:

April 12, 1991

Exec. Determ. No.:

7641

Employer Account No.

ISSUE:

Whether commissions paid to non-licensed salesmen from a collection agency are covered wages for unemployment insurance purposes.

- NOTICE OF RIGHT OF FURTHER APPEAL -

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAYBE FILED IN ANY DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT OFFICE OR WITH THE BOARD OF APPEALS. ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON April 29, 1991

- APPEARANCES -

For the Appellant:

Charles McDonaugh, President

For the Secretary:

Jerry Placek, Review
Det. Unit Supervisor

FINDINGS OF FACT

The employer filed a timely appeal to an agency determination which held that certain individuals were employees of Modern Systems International and not independent contractors within the meaning of Section 20(g) (6) (i)(ii) (iii) of the Maryland Unemployment Insurance Law.

Modern Systems International operates a collection service. This organization has been a Maryland corporation since 1971. The employer seeks individuals to act as sales representatives to market its "Accounts Receivable Control System".

Based on a finding by an agency field auditor, Ms. Eileen Plaine, Harry M. Friedman, Assistant Supervisor, Field Investigation and Audit, completed an agency determination holding that Ms. Plaine's findings were valid and that the individuals identified in her audit are to be considered employees of Modern Systems International. They are not to be considered as independent contractors.

The Special Examiner finds that during the audit period in question, each of the individuals identified in the audit were subject to minimal control by the employer. At the inception of their employment, the employer representative conducted a one-day training seminar. These individuals were advised as to a specific method to use in order to effectively sell the employer's "Accounts Receivable Control System". In addition, the employer provided these individuals with either an audio or video cassette tape which discussed a proper selling technique. Written material was also distributed to these individuals.

Additionally, from time to time, the employer would provide these sales representatives with names and addresses of perspective clients.

The Special Examiner finds that all sales work performed by these individuals occurred outside of the employer's business location.

The Special Examiner further finds that the employer was not able to substantiate, by the submission of any evidence, that any of these individuals were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question, during the period encompassed by the agency's audit. In addition, each individual was subject to a non-competition clause. Such non-competition clause was contained within the written agreement that they executed with the employer. This "covenant not to compete" extended for a six-month period from the date of their termination.

None of the individuals mentioned in the agency audit had obtained the necessary license, required by the state of Maryland, in order to act as a sales representative for the employer.

Additionally, the employer set the minimum price at which their product could be sold to a perspective client.

CONCLUSIONS OF LAW

In order for services performed by these sales representatives to be exempt under the Maryland Unemployment Insurance Statute, all three sections of 20(g) (6) (i) (ii) (iii) must be satisfied.

Section 20(g) (6) (i) (ii) (iii) of the Maryland Unemployment Insurance States:

"20(g) (6): Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this article, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Secretary that:

- (i) That individual has been and will continue to be free from control of direction over the performance of those services, both under his contract of service and in fact; and
- (ii) The service is either outside the usual course of the business for which that service is performed, or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (iii) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question."

The Special Examiner finds that each of these sales representatives had not been free from control or direction over at least a portion of their performance. Specifically, each had been subject to one day of training, each had been provided names and addresses of prospective clients, and the employer set the minimum price at which their product could be sold to a prospective client.

Since it was determined that each individual performed their respective sales work outside all of the places of business of the enterprise for which the service is performed, the employer is held to have met this portion of the statutory requirement.

However, the employer was unable to substantiate, by any evidence, that any of these individuals were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question. Additionally, none of these

individuals maintained the necessary license, required to perform their sales representative work, as required by the state of Maryland; and each individual was subject to a specific non-competition clause as detailed in their written agreement with the employer.

Therefore, since the employer has failed to meet Section 20(g)(6)(i) and (iii) of the Maryland Unemployment Insurance Law, the Special Examiner will find that services performed by these sales representatives, during the period encompassed by the audit report, are within covered employment. Their wages would have had to have been reported for Maryland Unemployment Insurance purposes.

The agency's Review Determination #7641 will be affirmed.

DECISION

Modern Systems International has not satisfied the statutory requirements of Section 20(g)(6)(i) and (iii) of the Maryland Unemployment Insurance Law regarding services performed by specific sales representatives as contained within the agency's audit report. These individuals' earnings were in covered employment at this employer, Modern Systems International, and the employer would have been required to report such wages for Maryland Unemployment Insurance purposes.

Therefore, the agency's Review Determination #7641 is affirmed.



Mark R. Wolf
Special Examiner

MRW: kbm
Date of Hearing: February 21, 1991
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